IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.277 of 1993

For Approval and Signature:
HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
VALIMKBHAI H PATEL - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant No(s).: 1.
NOTICE SERVED for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 21/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench 'A', has referred the following question under Section 256(1) of the Income-tax Act, 1961

(the Act), at the instance of the Commissioner of Income-tax.

> "Whether, the Appellate Tribunal is right in law and on fact in deleting the penalty levied u/s.271 (1)(c) on the ground that there cannot be any question of concealment of income when there is no income ?"

2. The Assessment Year is 1983-84. The assessee filed return of income declaring total loss of Rs.3,37,414/-. The assessee was assessed on a total income of Rs.2,94,480/-. In the return of loss the assessee, who is a manufacturer of common salt, claimed loss of 6,200 tonnes of salt washed away on account of cyclone (5100 tonnes) and rain wash (1100 tonnes) valuing the loss at Rs.50/- per tonne. In support of the claim a certificate from the Dy. Commissioner of salt to the effect that a loss of Rs.2,40,000/- had been suffered was produced. The Assessing Officer substituted the rate per tonne and adopting the figure of Rs.118/- per tonne computed the valuation of 6200 tonnes along with 1093 tonnes of closing stock at a figure of Rs.8,61,400/-. From the aforesaid figure after deducting Rs.2,40,000/-, being loss certified by the Dy.

Commissioner of salt, the balance sum of Rs.6,21,400/- was added to the total income.

3. The assessment order was challenged in the appeal and the Commissioner (Appeals) directed to take the value of the stock @ Rs.50/- per tonne as claimed by the assessee but rejected the assessee's claim of loss in terms of quantity in absence of proof to support the same. Accordingly, against addition of Rs.6,21,400/- addition of Rs.70,000/- was confirmed by CIT (Appeals).

4. The Assessing Officer initiated penalty proceedings under Section 271(1)(c) of the Act as, according to him, the assessee had failed to explain the loss in terms of quantity. After rejecting the explanation of the assessee he levied penalty @ 100% of the tax sought to be evaded amounting to Rs.25,250/-.

5. The assessee carried the matter in appeal before CIT (Appeals) who held that there was obviously no case for levy of penalty under Section 271(1)(c) of the Act. It was found that a particular

loss was claimed on an estimated basis; that the estimate was reduced by the CIT (Appeals) because no verification was possible of the actual loss. Therefore, according to the Commissioner (Appeals), it was only a matter of opinion on which the addition could be sustained or reduced. He, therefore, deleted the penalty.

6. The Revenue carried the matter in appeal before the Tribunal. The Tribunal upheld the order of CIT (Appeals) on a different ground. According to the Tribunal, penalty under Section 271(1)(c) of the Act cannot be imposed when ultimately there is a loss. For this purpose, the Tribunal took assistance of the decision in case of Commissioner of Income-tax *Vs. Prithipal Singh & Co.*, [1990] 183 ITR 69 (P & H) rendered by Punjab and Haryana High Court to hold that the word 'income' refers to a positive income. That evasion of tax is *sine qua non* for imposition of penalty. Referring to Explanation Nos.3 and 4 annexed to Section 271(1)(c) of the Act the Tribunal stated that even the explanations presuppose existence of taxable income in relation to the Assessment Year in question. The Tribunal, accordingly, deleted the penalty.

7. Heard Mr.M.R.Bhatt, learned Senior Standing Counsel for the applicant – revenue. Though served, there is no appearance on behalf of the respondent – assessee.

8. It is not necessary to enter into the larger controversy as to existence or otherwise of positive income in the facts of the present case. It is an admitted position that the assessee was carrying on business of manufacturing salt and salt is stored in open in heaps. Therefore, loss on account of cyclone and rain would be on an estimated basis. In fact this is what the Commissioner (Appeals) has found as a matter of fact that one estimate was substituted by another estimate. According to Commissioner (Appeals), in the circumstances, the assessee could not be visited with penalty merely because the assessee was not in a position to substantiate the claim in quantity. In light of the aforesaid factual position it is not possible to interfere with the final conclusion of the Tribunal. Both the CIT (Appeals) and the Tribunal have found and come to the conclusion that the penalty is not leviable in the present case, though for different reasons.

9. In light of the peculiar facts of the case, without entering into any discussion as to the legal position, the Tribunal's order requires no interference in light of the findings of fact recorded by the Commissioner (Appeals). The question referred is, therefore, answered in the affirmative i.e. in favour of the assessee and against the Revenue only to the extent of upholding the Tribunal's order that it was justified in deleting the penalty levied under Section 271(1)(c) of the Act.

10. The reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**